

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
DEPT. OF THE SECRETARY

Inquiry Concerning the Deployment of)
Advanced Telecommunications)
Capability to All Americans in a)
Reasonable and Timely Fashion, and)
Possible Steps to Accelerate Such)
Deployment Pursuant to Section 706 of)
the Telecommunications Act of 1996)

CC Docket No. 98-146

**REPLY COMMENTS OF
INTERMEDIA COMMUNICATIONS INC.**

INTERMEDIA COMMUNICATIONS INC. ("Intermedia"), through its undersigned counsel, hereby respectfully submits its Reply Comments in response to the Commission's *Notice of Inquiry*.¹ As more fully set forth below, advanced telecommunications services and capabilities are now being deployed in the United States, albeit at a much slower pace than is potentially possible. To further encourage and accelerate this process, the Commission's procompetitive initiatives necessarily should focus on ensuring that the incumbent local exchange carriers ("ILECs") abide by their statutorily-mandated, market-opening obligations. Similarly, as Intermedia pointed out in its comments, the Commission's procompetitive approach

¹ Notice of Inquiry, CC Docket No. 98-146 (rel. Aug. 7, 1998) (*Notice of Inquiry*).

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must be technology-neutral to encompass all types of advanced technology, available now or in the future.²

I. INTRODUCTION

The comments submitted in this proceeding represent a cross-section of the telecommunications and information services industry. While commenters have advanced numerous positions on how best to promote competition, there appears to be little question that advanced telecommunications services and capabilities are being deployed at some level.³ Where the commenters part, however, is on the question of how best to encourage a more robust deployment of these services and capabilities.

The record demonstrates a commonality of opinion among entities who rely on the ILECs' bottleneck facilities. They argue that the ILECs' networks must be pried open—and must remain open—to realize the full benefit of competition.⁴ Intermedia agrees. In particular, Intermedia concurs that only by dutifully and strictly enforcing the market-opening obligations imposed on the ILECs by the federal Telecommunications Act of 1996 (the “1996 Act”)—including, but not limited to, interconnection, access to unbundled network elements (“UNEs”), collocation, and resale—can the deployment of advanced telecommunications services and capabilities be truly accelerated. This includes, among other things, insisting that the ILECs provide dark fiber, as a UNE, to competing carriers, and requiring that the ILECs provide direct

² Moultrie Independent Telephone Company's comment that xDSL must be viewed as an interim technology, not unlike an eight-track audio cassette, is appropriate in this regard. *See* Comments of Moultrie Independent Telephone Company, at 4.

³ *See, e.g.*, Comments of Comcast Corporation, at 9-10; Comments of Intermedia, at 6.

⁴ *See, e.g.*, Comments of Commercial Internet Exchange Association, at 13-14; Comments of DSL Access Telecommunications Alliance, at 9-11; Comments of MCI/WorldCom Inc., at 4; Transwire Communications, Inc., at 12.

optical connection between competing carriers' facilities and ILEC facilities. As Intermedia stated in its comments—and reiterates here—any effort to permit the ILECs to insulate advanced services from the procompetitive provisions of the 1996 Act will slow, rather than speed, the deployment of advanced telecommunications services and capabilities.⁵ In this regard, Intermedia wholeheartedly agrees with the General Services Administration that advanced telecommunications services are most prevalent where there is more competition.⁶

**II. THE COMMISSION SHOULD SET A NATIONAL POLICY REQUIRING
THE ILECs TO PROVIDE DARK FIBER AS AN
UNBUNDLED NETWORK ELEMENT**

As the Commission recognizes, the ILECs control a significant amount of dark fiber. In 1997 alone, the ILECs' dark fiber constituted 67% of their total fiber deployment.⁷ The ILECs' have, as a matter of practice, uniformly rejected requests for access to dark fiber. The ILECs' intransigent refusal to allow their competitors to use their dark fiber has no sound legal, technical, or public policy basis. GTE, for example, argues that investment in and deployment of advanced telecommunications services would not be promoted by compelling the ILECs to lease dark fiber, given that dark fiber is not a UNE.⁸ GTE further argues that dark fiber is held for identified or anticipated future demand and, therefore, requiring GTE to lease dark fiber would simply shift the obligation to invest in additional capacity from new entrants to GTE.⁹

⁵ Comments of Intermedia Communications Inc., at 2.

⁶ Comments of General Services Administration, at 4-5.

⁷ *Notice of Inquiry*, n. 19 (citing FCC ARMIS Report 43-08 (1991-97)).

⁸ Comments of GTE, at 12.

⁹ *Id.*

These circuitous arguments rest on the erroneous assumption that (a) dark fiber is not a network element, and (b) the ILECs will not be compensated for their investment. As to the first argument, Intermedia agrees with Allegiance Telecom that Section 3(29) of the 1996 Act brings dark fiber within its definition.¹⁰ Section 3(20) defines a network element as “a facility or equipment used in the provision of telecommunications services.” Because dark fiber can, with the appropriate electronics, be used in the provision of telecommunications services, dark fiber clearly qualifies as a network element under Section 3(29).

GTE’s second argument is similarly flawed. Allowing competing carriers to lease its dark fiber does not jeopardize its investment. To the contrary, to the extent to which GTE would be fully compensated for the use of that facility consistent with the pricing standards of the 1996 Act, GTE gets an appropriate return on its investment.

Finally, there is a practical reason why the Commission should conclude that dark fiber must be made available to competing carriers as a UNE. To date, State regulatory commissions have been disappointingly inconsistent in their treatment of dark fiber—while some have unequivocally required the provision of dark fiber as a UNE, others have not been sympathetic to the idea. This “regulatory patchwork” has made it practically impossible for CLECs to explore the utility of dark fiber on a nationwide basis. A Commission determination that dark fiber is a network element that must be unbundled, would set a national standard and, consequently, would enable CLECs to utilize dark fiber to provide competitive services across the United States.

¹⁰ Comments of Allegiance Telecom, Inc., at 4

**III. THE COMMISSION SHOULD MANDATE THE PROVISION
OF DIRECT OPTICAL CONNECTIONS BETWEEN
ILEC AND CLEC FACILITIES**

As part of their concerted effort to deny competing carriers the ability to interconnect at technically feasible points within their networks, the record demonstrates that ILECs continue to reject CLEC requests to establish direct optical connections between CLEC and ILEC fiber optic facilities. Rather, CLECs are required to terminate their facilities in equipment that converts the optical signal to electrical signal, which is then reconverted to an optical signal by the ILEC for retransmission on the ILECs' optical facilities.¹¹

Intermedia concurs with Allegiance that this practice contravenes Section 252 of the 1996 Act. Accordingly, the Commission should compel the ILECs to provide to interconnecting carriers direct optical connections between their optical facilities and the CLECs' facilities. Intermedia further agrees with Allegiance that the ILECs should be required to provide the gamut of available interface options, including the SMF 28 interface. Similarly, the Commission should require the ILECs to provide both channelized and unchannelized high-capacity interfaces, such as OC-3 and OC-3c, up to OC-48 (or higher upon CLEC request).

**IV. THE COMMISSION SHOULD REJECT ILEC ATTEMPTS
TO INSULATE ADVANCED SERVICES FROM THE
PROCOMPETITIVE MANDATES OF THE 1996 ACT**

In an attempt to insulate themselves and their advanced services and facilities from the procompetitive mandates of the 1996 Act, the ILECs argue that no firm is *dominant* in the advanced services market.¹² Thus, they assert that regulations applicable to dominant carriers

¹¹ See, e.g., Comments of Allegiance Telecom. Inc., at 17.

¹² Comments of BellSouth. at 17.

should not apply to them.¹³ They claim that the Commission should limit unbundling and resale obligations to those “essential facilities” for which no substitutes are currently available, based on the notion that Congress intended unbundling to be confined to those facilities that a competitor needs to obtain from the incumbent in order to compete.¹⁴ They go as far as to say that there is no monopoly bottleneck on advanced technology.¹⁵ These arguments are untenable and must be rejected outright.

First, the arguments are predicated upon the mistaken notion that the local loop itself somehow can be separated from the advanced services and capabilities that are provided over that loop. Nothing can be further from the truth. That electronics and other advanced equipment may be placed on the loop does not change the nature of the loop—it continues to be the only connection between the competitive carrier and most subscribers, and a facility over which the ILECs have monopoly control. As AT&T aptly puts it, xDSL is just an upgraded version of the bottleneck monopoly facilities, like ISDN.¹⁶ This is supported by the Indiana Utility Regulatory Commission and the Staff of the Public Service Commission of Wisconsin in their response to the companion Notice of Proposed Rulemaking, in which they state that “the FCC should recognize that state commissions view xDSL and other broadband technologies that rely on the existing copper loop as *enhancements to the loop itself, not separate services.*”¹⁷ Thus, the ILEC

¹³ See, e.g., Comments of BellSouth, at 19 (Commission should forebear from tariffing, Section 214, and other dominant carrier regulations).

¹⁴ Comments of U S West Communications, Inc., at 28-29.

¹⁵ Comments of Bell Atlantic, at 4. They further argue that Section 251’s resale, unbundling, and collocation requirements were intended to provide access to the ILECs’ local exchange networks, not to newly emerging competitive services.

¹⁶ Comments of AT&T, at 47-48.

¹⁷ Comments of the Indiana Utility Regulatory Commission and Staff of the Public Service Commission of Wisconsin, at 16 (emphasis added).

argument that the bottleneck loop facilities must be viewed independently of the advanced services provided over those facilities simply does not hold water. In fact, it is inconsistent with the prevailing view of State commissions. Similarly, because the ILECs continue to retain control over bottleneck facilities, the argument that "dominant" regulations (*e.g.*, Section 214, tariffing, etc.) ought not to apply to them in the provision of advanced services, similarly must fail.

Finally, the interconnection, unbundling, collocation, and resale provisions of the 1996 Act do not distinguish between "essential" and "non-essential" facilities, as the ILECs would have the Commission believe. To the contrary, the 1996 Act seeks to open up the entire rate-payer-financed ILEC networks to competition. Any attempt to engraft a requirement based on artificial (and nonsensical) distinctions advanced by the ILECs would disturb the carefully drawn statutory framework contemplated by Congress.

V. THE COMMISSION SHOULD REJECT SOME PARTIES' ATTEMPTS TO RELITIGATE ISSUES THAT HAVE BEEN PREVIOUSLY RESOLVED

Several parties advance arguments that have been previously resolved. Intermedia addresses several of those arguments below.

Some ILECs question existing reciprocal compensation policies, particularly as they relate to Internet traffic.¹⁸ Bell Atlantic, for example, argues that state decisions requiring the payment of reciprocal compensation for Internet traffic encourage competing carriers from building their own facilities.¹⁹ The argument, of course, is flawed for several reasons.

¹⁸ See, *e.g.*, Comments of Bell Atlantic, at 9; Comments of Ameritech, at 9.

¹⁹ Comments of Bell Atlantic, at 9.

First, the argument rests on the proposition that the reciprocal compensation provisions of the 1996 Act distinguishes between “classes” of local traffic. They do not. Second, it assumes that the ILECs have the right to use the facilities of the competing carriers free-of-charge. They do not. Finally, the argument proceeds from a myopic observation that competing carriers are not building their own facilities to originate minutes. They are. Indeed, the fallacy in this argument cannot be any clearer from the billions of dollars facilities-based competing carriers have invested in deploying their own facilities.²⁰ Significantly, at least twenty-one (21) States have found that reciprocal compensation appropriately applies to traffic transported and terminated to Internet providers.

Some parties question the utility of the Commission’s Customer Proprietary Network Information (“CPNI”) rules. Intermedia notes only that this issue has been definitively and fully addressed by the Commission, and there is thus no reason to revisit it. Indeed, many of the commenters responding to the companion Notice of Proposed Rulemaking support strict enforcement of the Commission’s CPNI rules.²¹

Finally, some commenters argue that the Commission should focus on universal service issues as a means of eliminating regulatory barriers to broadband investment. The National Rural Telecom Association, in particular, suggests a review of universal service eligibility requirements.²² Again, Intermedia submits that this issue has been fully and definitively

²⁰ See, e.g., Comments of Intermedia, at 10-11 (Intermedia has raised over \$2.5 billion in the last 18 months to finance deployment of facilities).

²¹ See, e.g., Comments of ALTS, at 29; Comments of Internet Exchange Association, at 15; Comments of CompTel, at 29-31.

²² See, e.g., Comments of National Rural Telecom Association, at 12-13 (suggests removal of requirement that a carrier cannot receive any high cost support unless it is already providing all universal service).

addressed in several proceedings, and the Commission has already properly defined the eligibility requirements for universal service. Intermedia does not believe that this is the appropriate time or proceeding to revisit the issue.

VI. CONCLUSION

The record in this proceeding demonstrates that advanced telecommunications services and capabilities are being deployed in the United States. The record similarly shows that the growth of these advanced capabilities is slower than anticipated, due in large measure to the incumbents' intransigent refusal to open their bottleneck facilities. Accordingly, the Commission should strictly enforce the procompetitive mandates of the 1996 Act, and insist that the ILECs provide access and interconnection to their advanced capabilities to competing carriers. Only by prying open the ILECs' stranglehold on monopoly facilities can competition in broadband services truly develop.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October, 1998, a copy of **REPLY COMMENTS OF INTERMEDIA COMMUNICATIONS INC.** was delivered by hand to the following:

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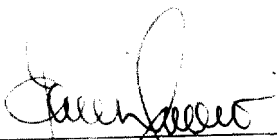
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